IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 499 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DINESHCHANDRA NAGINDAS SHAH

Versus

TARABEN WIDOW OF JAYNTILAL N.

Appearance:

MR KV SHELAT for Petitioner

MR NANDLAL THAKKAR for Respondent No. 1, 2

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 15/10/98

ORAL JUDGEMENT

This is a revision under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as `the Bombay Rent Act') against the judgement dated 9.3.1983 passed by the appellate Bench of the court of Small Causes Court, Ahmedabad, dismissing the appeal against the judgement and decree dated 21.6.1979 passed by the learned Judge, Small Causes Court at Ahmedabad. The

plaintiff-respondents filed a suit for recovery of possession of the suit property on the ground of default in payment of rent as well as on the ground of sub-letting. It is averred that one room on the second floor of house bearing Municipal Census No. 2658/3 was rented out on 28.2.1959 to defendant No. 1, namely, Dineshchandra Nagindas Shah on a monthly rent of Rs. 51/- plus Rs. 9/- payable towards municipal taxes. It is alleged that the petitioner tenant did not pay the rent since 12.6.1968. It is further alleged that defendant No. 1 unlawfully sub-let the premises first to one Abdul Razak Abdul Rehman Jasani who carried his own business in the name of Ideal Optical Company. Thereafter, he sub-let to defendant No. 2, namely, Chunilal Jivanlal Doshi, who carries on his business in the name of Paresh Grinding Works and P.P. Brothers since 1973-74. It is relevant to mention here that the present plaintiff had filed earlier a suit being H.R.P. Suit No. 4763 of 1969 against defendant No. 1 for recovery of arrears of rent and vacant possession on the ground of unlawful sub-letting and other grounds. The court in the said suit arrived at the conclusion that defendant No. 1 has unlawfully sub-let the premises first to Abdul Razak and then to Chunilal Jivanlal Doshi. The suit was dismissed on 28.11.1973 on the technical ground that all the co-owners were not joined in determining the tenancy of defendant No. 1 and all co-owners did not institute the suit. Immediately, thereafter the present suit was filed.

2. Defendant No. 1 filed written statement controverting the allegations. The defendant took the plea that there was initially a partnership between defendant and Abdul Razak and subsequently between him and defendant No. 2 Chunilal J. Doshi. The defendant also raised a plea that the present suit is barred by res judicata. The trial court found that defendant No. 1 had unlawfully sub-let the suit premises first to Abdul Razak and thereafter to defendant No. 2 Chunilal J. Doshi. So far as the plea of res judicata is concerned, the court held that the suit is not barred by res judicata. The trial court accordingly decreed the suit for possession of the suit premises in favour of the plaintiff. The tenant-petitioner preferred appeal against the said order to the appellate Bench of the Small Causes Court, Ahmedabad. The appellate Bench confirmed the findings of the trial court and dismissed the appeal. Hence this revision.

3. It is contended by Mr. K.V. Shelat, learned counsel for the petitioner, that both the courts below

have committed material illegality in exercise of jurisdiction in not considering that the suit was barred by res judicata. It is submitted that the earlier suit being H.R.P. Suit No. 4763 of 69 was between the same parties and the same issue i.e. sub-letting by the present plaintiff to Abdul Razak and subsequently to defendant No. 2 Chunilal J. Doshi was involved and though the suit was dismissed on technical ground but no liberty was given for filing fresh suit. The learned counsel has placed reliance on a decision in the case of PANDURANG VS. MARUTI reported in AIR 1966 SC 153 and contended that in revisional jurisdiction the High Court is competent to entertain the plea of limitation or principle of res judicata and can correct the same. There can be no dispute so far as this proposition is concerned. It may be stated that in the earlier suit the issue with respect to the sub-letting was decided in favour of the plaintiff. However, the same was dismissed on the ground of non-joinder of the necessary parties. It is settled law that when a suit is dismissed merely on technical ground, it cannot be said that the court decided the suit on merits. In the case of SHEODAN SINGH VS. DARYAO KUNVAR reported in AIR 1966 SC 1332 the court held that if the decision in the former suit was not on merit then it cannot be said that there would be bar of res judicata. In paragraph 13 the court has held as follows:-

"Reliance in this connection is placed on the well settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court-fee on a point which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit."

Thus, a suit dismissed on the ground of mis-joinder of the parties cannot be said to be decided on merits. Thus, in my view, the present suit is not barred by res judicata.

4. Mr. Shelat, learned counsel for the petitioner, reading Section 13(1)(e) of the Bombay Rent Act has stressed on the word "has sub-let" and submitted that sub-letting must continue till the date of the suit for passing the decree for eviction. The learned counsel in support of his contention has placed reliance on the decision in the case of GAJANAN VS. S.H. PATEL reported in AIR 1975 SC 2156 and RAGHUNATHI VS. RAJU RAMAPPA SHETTY reported in AIR 1991 SC 1040. I have read the judgements. In my view the judgement on the contrary help the respondents. In Gajanan's case (supra) the court held that "it cannot be contended that the sub-letting must continue at the date of the suit for passing the decree for eviction. The tenant's liability to eviction arises once the fact of unlawful sub-letting is proved at the date of the notice.". This clearly shows that once it is found that there is sub-letting, it is not necessary to continue. In Raghunathi's case (supra) the court has held that "at the date of the notice, if it is proved that there was unlawful subletting, the tenant is liable to be evicted. The mere fact that the sub-tenants may have left the premises after that date would be of no consequence". Thus, it is clear that a tenant would be disentitled of the protection under Section 13(1)(e) irrespective of the fact that subsequently the sub-tenant has restored the possession to original tenant. Thus, in my view there is no merit in this contention raised by the learned counsel for the petitioner.

5. It is next contended by the learned counsel for the petitioner that one of the important ingredients for establishing the subletting is that the tenant has divested himself not only of physical possession but also right of the possession i.e. to say there must be vesting of possession by the tenant in another person. The learned counsel has placed reliance on a decision of the apex court in the case of JAGAN NATH VS. CHANDER BHAN reported in AIR 1988 SC 1362. In this regard, I have gone through the judgement of both the courts below and have also looked at the relevant evidence. Plaintiff No. 2 Satishchandra Jayantilal Thakkar in his statement Exh. 33 has stated that Abdul Razak did his business in the suit premises in the name of Ideal Optical Company upto 1971 and thereafter defendant No. 2 Chunilal

Jivanlal Doshi did his business in the name of Optic Centre from 1978. His statement is corroborated by the statement of Ranchhodlal Haribhai Thakkar Exh. 46 who is the next door neighbour residing adjacent to the suit premises. His staircase is common with that of the suit premises. He has stated that Chunilal J. Doshi carries on business in the suit premises in the name of Optic Centre. He has stated that previously Abdul Razak used to sit there and do business. He has also stated that Chunilal Doshi has been doing business till now i.e. the date of his recording of his statement on 6.2.1979. He has also stated that defendant No. 1 did not visit the suit shop for the last 12 to 19 years and he does not carry on any business there. Statement of Ranchhodlal is supported by defendant's witness Ismail Bagwan Exh. 74. Thus, it is clear that in the suit premises earlier Abdul Razak was carrying on business and later on defendant No. 2 Chunilal J. Doshi was carrying on business of grinding of spectacle glass. Thus there is ample evidence of vesting of possession. The defendant has taken the plea that there was a partnership between themselves but they have not produced any documents in that regard. The finding of facts arrived at by both the courts below on the basis of the documents and oral evidence does not call for interference by this court. In view of the aforesaid, I find no merit in this revision application and the same is accordingly rejected. Rule discharged. Interim relief vacated.

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